(1) No. 961296 JAN 30 1997

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In The

Supreme Court of the United States

October Term 1996

THOMAS E. HORTON,

Petitioner,

v.

UNION RECOVERY LIMITED PARTNERSHIP,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petition for Writ of Certiorari

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26 pp

QUESTION PRESENTED

1. Whether the six-year statute of limitations under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821(d)(14), applicable by its plain language only to actions brought by the RTC as receiver for a failed financial institution, creates an assignable statutory right that permits assignees of the RTC to bring an action on a demand note beyond the statute of limitations applicable under state law.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED IN THE CASE 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

I. THE VIRGINIA SUPREME COURT OPINION DIRECTLY CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT REGARDING STATUTORY CONSTRUCTION OF THE FINANCIAL INSTITUTIONS REFORM, RECOVERY AND ENFORCEMENT ACT ("FIRREA") AND OTHER COMPLEX FEDERAL LEGISLATION 5

A. The Virginia Supreme Court Opinion Disregards the Plain Language Rule 6

B. The Virginia Supreme Court Opinion Fails to Address the Decision of the United States Supreme Court in O'Melveny & Myers v. FDIC 9

1. "There is no federal general common law" 10

2. There is "no significant conflict with an identifiable federal policy or interest" to justify displacement of state law rules of decision 12

3. The United States Supreme Court rejected the Ninth Circuit's application of D'Oench, Duhme to create federal law where state law governs 14

C. The Trial Court Properly Relied on the WAMCO Decision 16

II. THIS PRECISE ISSUE IS PENDING IN THE FOURTH CIRCUIT AND THERE IS A SUBSTANTIAL POSSIBILITY OF A SPLIT IN AUTHORITY 18

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Page

A.I. Trade Finance, Inc. v. Petra Int'l Banking Corp.,
62 F.3d 1454 (D.C. Cir. 1995) 11

Boyle v. United Technologies Corp.,
487 U.S. 500 (1988) 12

Caminetti v. United States,
242 U.S. 470 (1917) 6

CMF Virginia Land, L.P. v. Brinson,
806 F. Supp. 90 (E.D. Va. 1992) 14

Demarest v. Manspeaker,
498 U.S. 184 (1991) 6

D'Oench, Duhme & Co. v. FDIC,
315 U.S. 447 (1942) 8, 14-16

Erie R. Co. v. Tompkins,
304 U.S. 64 (1938) 10

Fall v. Keasler,
No. C-90-20643-SW (ARB),
1991 WL 340182 (N.D. Cal. 1991) 8

FDIC v. Bledsoe,
989 F.2d 805 (5th Cir. 1993) 8-15, 17

FDIC v. O'Melveny & Myers,
969 F.2d 744 (9th Cir. 1992),
rev'd, ___ U.S. ___,
114 S. Ct. 2048 (1994).....9, 13, 14

Guth v. Hamlet Associates, Inc.,
230 Va. 64, 334 S.E.2d 558 (1985) 17

Kamen v. Kemper Financial Services, Inc.,
500 U.S. 90 (1991).....12

Milwaukee v. Illinois,
451 U.S. 304 (1981).....11

Mountain States Financial Resources Corp. v. Agrawal,
777 F. Supp. 1550 (W.D. Okla. 1991).....8, 15

Northwest Airlines, Inc. v. Transport Workers,
451 U.S. 77 (1981).....11

O'Melveny & Myers v. FDIC,
___ U.S. ___, 114 S. Ct. 2048,
2054 (1994)..... 7-13, 15, 19

RTC v. Young,
93 Civ. 6531 (LMM),
1996 U.S. Dist. LEXIS 5916,
*3 (S.D.N.Y. 1996).....13

RTC Commercial Loan Trust v. Winthrop Mgt.,
923 F. Supp. 83 (E.D. Va. 1996) 15, 18

United States v. Kimball Foods, Inc.,
440 U.S. 715 (1979).....12

Wallis v. Pan American Petroleum Corp.,
384 U.S. 63 (1966) 10, 12

WAMCO III, Ltd. v. First Piedmont Mortgage Corporation,
856 F. Supp. 1076 (E.D. Va. 1994) 7, 14-18

Statutes and Rules

12 U.S.C. § 1821 ..... 1, 3, 7, 8, 15

28 U.S.C. § 1257(a) 1

Va. Code § 8.01-246 18

Va. Code § 8.3-122 17

Rule 3:3, Rules of the Virginia Supreme Court 3

Other

135 Cong. Rec. S10205 (daily ed. August 4, 1989) 7

6A C.J.S. Assignment § 76 17

Hawkland & Lawrence UCC Series § 3-201:02 (Art. 3) ... 17

PETITION FOR WRIT OF CERTIORARI

Thomas E. Horton respectfully petitions the United States Supreme Court to issue a Writ of Certiorari to review a decision of the Supreme Court of Virginia on this important issue of federal law.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia giving rise to this petition is heretofore unpublished, but is reprinted at App. A-1 through A-11. A letter opinion of the Circuit Court for the County of Fairfax, Virginia, is also unpublished, but is reprinted at App. A-12 through A-17.

JURISDICTION

The opinion of the Supreme Court of Virginia, entered on November 1, 1996, decides an issue arising under the statutes of the United States. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED IN THE CASE

I. Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821(d)(14).

> (14) Statute of limitations for actions brought by conservator or receiver
>
> (A) In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be --

(i) in the case of any contract claim, the longer of --

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law;

* * *

(B) Determination of the date on which a claim accrues

For purposes of subparagraph (A), the date on which the statute of limitation begins to run on any claim described in such subparagraph shall be the later of --

(i) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues.

STATEMENT OF THE CASE

Petitioner Thomas E. Horton (hereinafter "Dr. Horton") executed a demand note on June 8, 1989, in connection with a loan obtained from Federal Savings Bank of Virginia, F.S.B. The demand note, on its face, provided that $80,000.00 principal is due "ON DEMAND, BUT IF NO DEMAND IS MADE THEN ON JULY 1, 1990." App. A-37.

Union Recovery Limited Partnership ("Union") filed an action to recover on the demand note in the Circuit Court for the County of Fairfax on August 30, 1995. According to the motion for judgment[1] filed by Union, "[t]he Resolution Trust Corporation ('RTC') . . . acquired all right, title and interest in the Note . . . when it was appointed Receiver for the Federal Savings Bank of Virginia, F.S.B., on or about April 10, 1992." App. A-28.

The motion for judgment stated further that "[t]he RTC, as Receiver for the Federal Savings Bank of Virginia, F.S.B., has assigned all right, title, and interest in the Note. . . to plaintiff Union." App. A-28. An endorsement on the demand note indicates that the assignment by the RTC to Union actually occurred on June 26, 1995. App. A-45, 46.

Union alleged in its motion for judgment that under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821(d)(14), and related case law, Union had six years from the date the RTC was appointed receiver for Federal Savings Bank of Virginia to bring its action. App. A-28, 29.

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[1] Under the Rules of the Virginia Supreme Court, a civil action is commenced by filing in the clerk's office a "motion for judgment." Va. Sup. Ct. Rule 3:3. The motion for judgment is the procedural equivalent of a complaint under the Federal Rules of Civil Procedure.

Dr. Horton responded to the motion for judgment by filing a plea of the statute of limitations. App. A-56 through 60. Dr. Horton argued that the action was time-barred under Virginia law, contending that the five-year statute of limitations applicable to written contracts under Virginia law governed and that Union's action on the demand note accrued upon execution of the instrument. Under applicable Virginia law, the period for bringing the action on the note expired on June 8, 1994. App. A-5. Union has never disputed that the time for bringing the action under Virginia's statute of limitations expired prior to filing of the action.

Dr. Horton further argued that the six-year limitation period under FIRREA, upon which Union relies in bringing its action on the note, applies only to the Resolution Trust Corporation ("RTC") suing in its capacity as receiver for a failed financial institution, and not to assignees of the RTC.

The trial court entered judgment in favor of Dr. Horton on the plea of the statute of limitations on November 17, 1995. App. A-19.

Union filed a motion for reconsideration on November 29, 1995, arguing that recent amendments to the Uniform Commercial Code, as adopted in Virginia, supported its contention that the FIRREA statute of limitations governed this action. On December 4, 1995, the trial court issued a written opinion, which set forth the rationale underlying the court's decisions to sustain Dr. Horton's plea of the statute of limitations and deny Union's motion for reconsideration. App. A-12 through A-17.

Union petitioned the Supreme Court of Virginia, seeking to appeal the trial court determination of the following question:

> Where a federally insured financial institution has failed, the RTC has been appointed receiver for the institution, and the RTC has

assigned a note executed in favor of the failed bank to an assignee, does the assignee stand in the shoes of the RTC with respect to the expanded statute of limitations set forth in FIRREA so that the assignee may enforce the note?

The Virginia Supreme Court granted Union's petition for appeal. After briefing and oral argument of the federal law issue, the Virginia Supreme Court reversed the trial court's ruling that the FIRREA statute of limitations is applicable by its plain language only to the RTC in its capacity as receiver. The opinion of the Virginia Supreme Court was entered on November 1, 1997. App. A-1 through A-11.

REASONS FOR GRANTING THE WRIT

I. THE VIRGINIA SUPREME COURT OPINION DIRECTLY CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT REGARDING STATUTORY CONSTRUCTION OF THE FINANCIAL INSTITUTIONS REFORM, RECOVERY AND ENFORCEMENT ACT ("FIRREA") AND OTHER COMPLEX FEDERAL LEGISLATION.

At issue in Union's appeal to the Virginia Supreme Court was the proper statutory construction of the six-year statute of limitations under FIRREA, applicable by express terms only to actions brought by the RTC in its capacity as receiver to enforce contracts on behalf of failed financial institutions.

The Virginia Supreme Court ignored established principles of proper statutory construction, despite opinions

of the United States Supreme Court which articulate clear guidelines applicable to complex federal legislation, specifically FIRREA. Following the flawed analysis of other courts that have addressed this issue, the Virginia Supreme Court concluded that the FIRREA statute of limitations creates in the receiver for failed financial institutions (FDIC or RTC) an assignable contract right to enforce an instrument beyond the state law limitation period, irrespective of the fact that the statutory power is plainly conferred upon the receiver by virtue of its status with respect to the receivership and does not purport to create additional contract rights.[2]

A. The Virginia Supreme Court Opinion Disregards the Plain Language Rule.

Judicial construction of federal legislation necessarily begins with the plain language of the statute. Demarest v. Manspeaker, 498 U.S. 184, 187 (1991) ("In deciding a question of statutory construction, we begin of course with the language of the statute."). "The meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." Caminetti v. United States, 242 U.S. 470 (1917). By its plain language, the FIRREA statute of limitations is applicable to the RTC when it brings an action as receiver for a failed financial institution, but does not apply to assignees of the RTC.[3]

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[2] The FIRREA statute of limitations uses the phrase "[n]otwithstanding any provision of any contract . . . ," rather than "in addition to any provision of any contract . . ." or other language which would suggest that the statute was intended to broaden the body of rights associated with contract.

[3] A plain language interpretation of the FIRREA statute of limitations is wholly consistent with its legislative history, which is summarized in a statement by Sen. Riegle that the provision

The trial court correctly applied the "plain language" rule when it observed in its letter opinion dated December 4, 1995, "[t]he plain language of the RTC Statute applies only to actions brought by the RTC as receiver and is silent on whether the statute applies to assignees of the RTC." App. A-14. The judgment of the trial court is consistent with the plain language of 12 U.S.C. § 1821(d)(14). The trial court refused to wade into the murky waters of judicial legislation, stating "the fundamental underpinning of Wamco . . . is, that Bledsoe and similar cases ignore the plain language of the RTC Statute:

> It is no doubt true that there are valid policy reasons which can be advanced for interpreting the statute in another fashion. However, that is a matter for the legislature, not for the courts, and where, as here, Congress has spoken plainly to confer a benefit on a particular entity functioning in a particular status, it is not for the courts to assess the various policy considerations which would support having the statute to provide otherwise."

App. A-16, 17 (quoting WAMCO III, Ltd. v. First Piedmont Mortgage Corporation, 856 F. Supp. 1076, 1087-88 (E.D. Va. 1994)); accord O'Melveny & Myers v. FDIC, ___ U.S. ___, 114 S. Ct. 2048, 2054 (1994) (matters left unaddressed

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"significantly increase[s] the amount of money that can be recovered by the Federal Government through litigation . . ." 135 Cong. Rec. S10205 (daily ed. August 4, 1989) (emphasis added). The legislative history regarding the limitation period clearly contemplates enforcement of contracts by the receiver through litigation, but does not contemplate liquidation of commercial paper by the receiver at a substantial discount in secondary markets.

in a comprehensive and detailed statutory scheme "are presumably left subject to the disposition provided by state law"). Because the trial court ruling is consistent with the plain language of FIRREA, the judgment of the trial court was correct as a matter of federal law and consistent with the proper rules of statutory construction applicable to FIRREA.

The opinion of the Virginia Supreme Court does not address the issue of the plain language of 12 U.S.C. § 1821(d)(14). Instead, the Virginia Supreme Court cites a series of cases in which courts have either ignored, or improperly applied, established principles of statutory construction to expand the FIRREA statute of limitations beyond its stated applicability. The principal cases upon which the Virginia Supreme Court relies -- Mountain States, Fall v. Keasler, and Bledsoe -- each has held that assignees of the RTC are governed by the FIRREA statute of limitations. FDIC v. Bledsoe, 989 F.2d 805 (5th Cir. 1993); Mountain States Financial Resources Corp. v. Agrawal, 777 F. Supp. 1550 (W.D. Okla. 1991); Fall v. Keasler, No. C-90-20643-SW (ARB), 1991 WL 340182 (N.D. Cal. 1991). Other cases cited in the Virginia Supreme Court opinion add little insight to the underlying rationale of the opinion, except that those cases follow the Bledsoe triumvirate to the same faulty conclusion regarding construction of complex federal legislation.

The Bledsoe cases purport to find authority for an overly-expansive construction of the FIRREA statute of limitations in: (1) the common law of assignments; (2) public policy; and (3) the D'Oench, Duhme doctrine. The faulty foundation of Bledsoe is shaken to dust by the sound principles of statutory construction enunciated by the United States Supreme Court in the recent opinion in O'Melveny & Myers v. FDIC, ___ U.S. ___, 114 S. Ct. 2048 (1994), which the Virginia Supreme Court declined to consider in its opinion.

B. The Virginia Supreme Court Opinion Fails to Address the Decision of the United States Supreme Court in O'Melveny & Myers v. FDIC.

The opinion of the United States Supreme Court in O'Melveny & Myers articulates principles of statutory construction applicable to FIRREA that undermine the rationale of the Bledsoe line of cases in each of the three areas of analysis. Thus, the reliance upon Bledsoe and similar cases by the Virginia Supreme Court is grossly misplaced.

In O'Melveny & Myers, the FDIC, acting in its capacity as receiver for a failed financial institution, had filed suit against a law firm alleging state law causes of action for professional negligence and breach of fiduciary duty arising out of allegedly fraudulent conduct. The law firm moved for summary judgment, arguing that knowledge of the alleged fraudulent conduct by officers of the failed institution must be imputed to the institution and, therefore, to the FDIC as its receiver. The law firm contended that a state law rule of decision should govern the issue of "imputed knowledge," while the FDIC argued that a federal common-law rule of decision should govern in order to be consistent with the federal policy and interest behind FIRREA. The trial court entered summary judgment in favor of the law firm, but the Ninth Circuit reversed based on an analysis similar to the Bledsoe cases. FDIC v. O'Melveny & Myers, 969 F.2d 744, 751-52 (9th Cir. 1992), rev'd, ___ U.S. ___, 114 S. Ct. 2048 (1994).

The United States Supreme Court granted certiorari and reversed the Ninth Circuit, holding that state law rules govern issues unaddressed by Congress in comprehensive and detailed statutory schemes such as FIRREA. The opinion of Justice Scalia noted that the circumstances under which courts should engage in "judicial creation of a special

federal rule" (as courts in the Bledsoe line of cases have done) are "few and restricted." O'Melveny & Myers v. FDIC, ___ U.S. ___, 114 S. Ct. 2048, 2055 (1994). The opinion further articulated specific guidelines for proper construction of federal statutes, which amplify the shortfalls of the Bledsoe cases.

1. "There is no federal general common law."

Justice Scalia, speaking for a unanimous Court, rejected the FDIC argument that the Court should fashion a federal common-law rule of decision in light of the policy interests behind FIRREA, stating unequivocally that "[t]here is no federal general common law." O'Melveny & Myers, ___ U.S. at ___, 114 S. Ct. at 2053 (citing Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)). Only in "few and restricted" cases should the court create special federal rules of decision where Congress has not addressed the issue expressly. Such cases are "limited to situations where there is a 'significant conflict between some federal policy or interest and the use of state law.'" O'Melveny & Myers, ___ U.S. at ___, 114 S. Ct. at 2055 (quoting Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966)).

The principles articulated by the United States Supreme Court in O'Melveny & Myers are in direct conflict with the approach followed by the Fifth Circuit in Bledsoe and the Virginia Supreme Court in the opinion below The Virginia Supreme Court based its conclusions regarding construction of the FIRREA statute of limitations on the statement in Bledsoe that "[i]t is an axiomatic principle of statutory construction that in effectuating Congress' intent courts are to fill the inevitable statutory gaps by reference to the principles of the common law." App. A-10 (citing Bledsoe, 805 F.2d at 810). The Bledsoe court recognized that the FIRREA statute of limitations provision is silent as

to assignees of the FDIC (or RTC). Id. However, the court then leaped to the conclusion that silence should be interpreted as a statutory gap to be filled by federal common law, thereby displacing the applicable state law rule of decision without further consideration. Addressing this precise issue of whether it is within the power of the court to supplant state law with a federal common-law rule of decision where Congress has not expressly so provided, Justice Scalia stated:

> In answering the central question of displacement of [state] law, we of course would not contradict an explicit federal statutory provision. Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed [by Congress] in such a scheme are presumably left subject to the disposition provided by state law.

O'Melveny & Myers, ___ U.S. at ___, 114 S. Ct. at 2054 (emphasis added) (citing Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 97 (1981) and Milwaukee v. Illinois, 451 U.S. 304, 319 (1981)); accord A.I. Trade Finance, Inc. v. Petra Int'l Banking Corp., 62 F.3d 1454, 1459 (D.C. Cir. 1995) ("Simply put, we have no warrant to expand what little federal common law of necessity fills the interstices of our federated legal system -- especially in an area where the Congress has legislated to some extent yet stopped short of supplanting a well-developed body of state law.").

The proper approach for the Bledsoe court to follow, where the court had determined that the issue of assignees had not been addressed by Congress in the context of the FIRREA statute of limitation, would have been to apply the

state law rule of decision. This is precisely what the Circuit Court for Fairfax County did in sustaining Dr. Horton's plea of the statute of limitations. Unlike the opinion of the Virginia Supreme Court, the judgment of the trial court was consistent with the principles articulated by the United States Supreme Court in O'Melveny & Myers.

2. There is "no significant conflict with an identifiable federal policy or interest" to justify displacement of state law rules of decision.

Having recognized that there are "few and restricted" cases which may justify "judicial creation of a special federal rule," the United States Supreme Court explained that in order to warrant a judicial endeavor into the realm of law-making, there must exist a "significant conflict between some federal policy or interest and the use of state law." O'Melveny & Myers, ___ U.S. at ___, 114 S. Ct. at 2055 (quoting Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966)). "Our cases uniformly require the existence of such a conflict as a precondition for recognition of a federal rule of decision." O'Melveny & Myers, ___ U.S. at ___, 114 S. Ct. at 2055 (citing Kamen v. Kemper Financial Services, Inc., 500 U.S. 90 (1991); Boyle v. United Technologies Corp., 487 U.S. 500, 508 (1988); and United States v. Kimball Foods, Inc., 440 U.S. 715, 728 (1979)). The Court expressly rejected the same arguments urged here by Union, and upon which the courts in the Bledsoe cases rely, that there is a substantial financial interest in fashioning a "special federal rule of decision" to accommodate assignees of the RTC. O'Melveny & Myers, ___ U.S. at ___, 114 S. Ct. at 2055 ("Our cases have previously rejected 'more money' arguments remarkably similar to the one made here."). In the Court of Appeals decision reversed by the United States Supreme Court in O'Melveny & Myers, the

Ninth Circuit had observed, in fashioning a federal common-law rule of decision under a rationale identical to the public policy argument of the Bledsoe cases, that:

> Also significant is the fact that the receiver becomes the bank's successor as part of an intricate regulatory scheme designed to protect the interests of third parties who also were not privy to the bank's inequitable conduct. That scheme would be frustrated by imputing the bank's inequitable conduct to the receiver, thereby diminishing the value of the asset pool held by the receiver and limiting the receiver's discretion in disposing of the assets. [citations omitted]"

FDIC v. O'Melveny & Myers, 969 F.2d 744 (9th Cir. 1991), reversed, ___ U.S. ___, 114 S. Ct. 2048 (1994) (emphasis added). These policy arguments were flatly rejected by the Supreme Court in O'Melveny & Myers as insufficient federal interests to warrant judicial creation of a special federal rule of decision to supersede the otherwise applicable state law rule of decision. The United States Supreme Court concluded, after a lengthy discussion of the FDIC's public policy arguments, that "this is not one of those extraordinary cases in which the judicial creation of a federal rule of decision is warranted." O'Melveny & Myers, ___ U.S. at ___, 114 S. Ct. at 2056; accord RTC v. Young, 93 Civ. 6531 (LMM), 1996 U.S. Dist. LEXIS 5916, *3 (S.D.N.Y. 1996) ("No federal interest more compelling than those unsuccessfully invoked in O'Melveny has been argued in the present case. Thus, state law governs the questions currently before this Court.").

3. The United States Supreme Court rejected the Ninth Circuit's application of D'Oench, Duhme to create federal law where state law governs.

Much like the Bledsoe cases, the Ninth Circuit in FDIC v. O'Melveny & Myers looked to the D'Oench, Duhme doctrine[4] as justification for ignoring applicable state law rules of decision in favor of creating a federal rule of decision based on common law principles. FDIC v. O'Melveny & Myers, 969 F.2d at 751. The Ninth Circuit cited D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942), as authority for its broad statement that "[i]t is now clear beyond doubt that federal, not state, law governs the application of defenses against FDIC." Id. at 751 and n.9. Concluding that a state law rule of decision did in fact govern, Justice Scalia rejected the Ninth Circuit's reliance on D'Oench, Duhme to justify its judicial creation of a federal rule of decision to displace applicable state law. O'Melveny & Myers, ___ U.S. at ___, 114 S. Ct. at 2055-56. The United States Supreme Court's unwillingness to accept the D'Oench, Duhme doctrine as unrestricted license for courts to fashion court-made federal common-law rules casts a pall over the rationale of the Bledsoe cases and their reliance on D'Oench, Duhme.

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[4] The D'Oench, Duhme doctrine is based on the narrowly-framed policy that federal agencies are able to properly perform their supervisory and insurance functions effectively only if they are able to rely on the books and records of the failed financial institution. See, e.g., CMF Virginia Land, L.P. v. Brinson, 806 F. Supp. 90, 92-93 (E.D. Va. 1992). The doctrine, and its codification at 12 U.S.C. § 1823(e), are limited to the avoidance of secret agreements unknown to the receiver. The issue before this Court does not involve undisclosed agreements, nor can a statute of limitations be properly categorized as such. See, e.g., WAMCO, 856 F. Supp. at 1087 n.12.

A recent case in the United States District Court for the Eastern District of Virginia likewise rejects the expansive reach the Bledsoe cases have attributed to D'Oench, Duhme. In RTC Commercial Loan Trust v. Winthrop Mgt., 923 F. Supp. 83, 86 (E.D. Va. 1996), The Honorable Richard L. Williams considered whether D'Oench, Duhme should be extended "not only to the secret agreement context, but also to allow assignment of the right to sue in federal court under § 1821(d)(17)(A)."[5] The Court rejected the rationale of the Mountain States and Bledsoe cases, which "appear to hold that D'Oench, Duhme is a carte blanche to allow assignment of RTC's FIRREA rights." Id. at 87. The Court noted that the Eastern District of Virginia had "rejected this expansive trend, at least with respect to the [FIRREA] statute of limitations." Id. Turning to the opinion in WAMCO, the Court stated that "while the RTC may assign its rights, it may not assign its status as a federal entity - it may not deputize a private party with the full powers of RTC." Id.

As in O'Melveny & Myers and WAMCO, the Court refused to extend D'Oench, Duhme beyond the "secret agreement context," stating:

> [An assignee of the RTC] stands in the shoes of the original lender. Only in the secret agreement context would it stand completely in RTC's more comfortable shoes.
>
> While it is a fundamental maxim of common law that the assignee stands in the

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[5] Judge Williams appears to have identified the "slippery slope," which the Bledsoe court failed to recognize or, at least, address. If the FIRREA statute of limitations creates an assignable right in the receiver (FDIC or RTC), then the same argument can be made as to any other so-called "right to enforce" granted to the receiver under FIRREA, such as the right to enforce the contract in federal court.

> shoes of the assignor, certain rights are purely personal and cannot be assigned.

Id. at 88. The Court held that "where RTC assigns claims unrelated to secret agreements, the rule of D'Oench, Duhme does not sanction the assignment of RTC's right to sue in federal court." Id. The Court made it abundantly clear that its decision "reaffirms and extends the rationale of WAMCO, III, Ltd. v. First Piedmont Mortgage Corp." Id.

C. The Trial Court Properly Relied on the WAMCO Decision.

The facts presented to the trial court were legally and factually indistinguishable from the case decided by The Honorable Robert E. Payne in WAMCO. In WAMCO, a demand note and guaranty were executed on October 7, 1987. On December 13, 1991, the RTC was appointed receiver for the financial institution that held the demand note and guaranty. On June 30, 1992, the RTC assigned the demand note and guaranty to a third party. The assignee filed an action to recover on the demand note and guaranty on October 7, 1993. The court ruled that under Virginia law, the causes of action on the demand note and guaranty accrued on the date the instruments were signed. Applying the Virginia five-year statute of limitations applicable to written contracts, the court held that the action of the assignee was time-barred.

Like Union, the assignee in WAMCO argued that it should be given the benefit of the FIRREA six-year statute of limitations, but the WAMCO court rejected that argument based on the plain language of the statute. Judge Payne concluded that the right to bring an action within the six-year limitation period under FIRREA is "a right conferred upon RTC solely in its status as receiver and clearly personal to it when, and only when, acting in that status, it files an action."

WAMCO, 856 F. Supp. at 1087. The court observed that the "RTC, as receiver, did not institute this action and hence the six-year statute of limitations in FIRREA does not apply here." Id. The WAMCO court refused to follow the flawed reasoning of the Bledsoe line of cases, pointing out that the Bledsoe court and others, in looking to the common law of assignments to create a federal rule of decision, have overlooked the established principle in the common law of assignments that "personal rights" of an assignor do not transfer to an assignee.[6]

Like WAMCO, Union's action in the trial court sought recovery on a demand note and guaranty. Under Virginia law, a cause of action to recover on a demand note accrues on the date of the instrument or, if no date is stated, on the date of issue. Va. Code § 8.3-122(1)(b); accord Guth v. Hamlet Associates, Inc., 230 Va. 64, 72, 334 S.E.2d 558, 563-64 (1985) ("A demand note matures and is payable at once, and interest and the statute of limitations begin to run on that date."). The demand note executed by Horton bears a date of June 8, 1989, which as a matter of Virginia law is the date the cause of action accrued. A cause of action to recover on a demand note is an action on a written contract and, therefore, the applicable limitation period in which to bring an action on a demand note is five years. Va. Code § 8.01-246(2); WAMCO, 856 F. Supp. at 1083. The limitation

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[6] The Virginia Supreme Court does not address the issue of the assignability of "personal rights." However, there is no authority to suggest that the common law in Virginia differs from the principles articulated in WAMCO. WAMCO, 856 F. Supp. at 1086-87 (quoting 6A C.J.S. Assignment § 76 and Hawkland & Lawrence UCC Series § 3-201:02 (Art. 3)). In fact, a Virginia Supreme Court Justice once observed that it is the law in Virginia that defenses which are "purely personal" to an assignor of an obligation may not be available to an assignee as against the original obligee. See Linbrook Realty Corp. v. Rogers, 158 Va. 181, 191, 163 S.E. 346, 349 (1932) (Epes, J., concurring).

period applicable to Union for bringing an action on the demand note executed by Horton expired on June 8, 1994, five years from the date of the demand note. Union filed its action on August 30, 1995, more than a year after the applicable limitation period had expired. In light of the above, the trial court properly ruled that Union's action was time-barred under Virginia law.

II. THIS PRECISE ISSUE IS PENDING IN THE FOURTH CIRCUIT AND THERE IS A SUBSTANTIAL POSSIBILITY OF A SPLIT IN AUTHORITY.

There are at least two other instances in which federal district court judges sitting within the Fourth Circuit have adopted the reasoning of WAMCO, one of which is discussed, supra. In that case out of the Richmond Division of the Eastern District of Virginia, The Honorable Richard L. Williams "reaffirm[ed] and extend[ed] the rationale of WAMCO . . . ". RTC Commercial Loan Trust, supra, at 88 (E.D. Va. 1996). In another case out of the Alexandria Division of the Eastern District of Virginia, Federal Financial Co. v. Hall, Civ. Action No. 95-1600-A (Dec. 29, 1995) (unreported), The Honorable James C. Cacheris followed WAMCO in a case factually similar to the instant case.

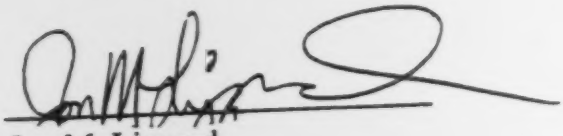
The Federal Financial case is presently on appeal to the United States Court of Appeals for the Fourth Circuit (Record No. 96-1143) on precisely this same issue. As of this date, the Fourth Circuit has not ruled on the issue. However, if the decision of the district court is upheld, there will not only be a split of authority between the circuits, but conflicting decisions between the Fourth Circuit and the Virginia Supreme Court. This petition, if granted, will avoid the confusion that will unavoidably occur if the Fourth

Circuit properly applies the principles of O'Melveny & Myers to this issue.

CONCLUSION

For the foregoing reasons, this Court should grant the Petitioner's Writ of Certiorari.

Date: January 28, 1997



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